

1 article is that it's just a wash with respect
2 to independent programming, that there is no
3 difference between a vertically integrated MSO
4 and a non-vertically integrated MSO with
5 respect to independent programming. Isn't
6 that right?

7 A I can't recall that particular
8 fact right now. But to say that it is more
9 likely given that it is vertically integrated,
10 it has got to be more relative to something.
11 And I think that something is relative to an
12 independent network. I am happy to have a
13 look at it.

14 Q Sure.

15 A What is important, too, is how I
16 characterize it in my testimony --

17 JUDGE SIPPEL: Well, now, look,
18 Dr. Singer, you are going beyond what your
19 purpose here today is. Just answer the
20 question and limit your answer to the
21 question.

22 THE WITNESS: Okay.

1 JUDGE SIPPEL: Go ahead, sir.

2 MR. BURKE: If I may, Your Honor,
3 I would like to mark another exhibit, please?

4 JUDGE SIPPEL: Sure.

5 MR. BURKE: This is Comcast
6 exhibit 421.

7 JUDGE SIPPEL: I like your
8 numbering system. I am not quite sure what it
9 means, but as long as we can keep track.

10 This Comcast exhibit number 421 is
11 headed "Reciprocal Carriage of Vertically
12 Integrated Cable Networks and Empirical
13 Study." I gather it's a Mr. Kang, Kang. And
14 it's dated August 30, 2005.

15 (Whereupon, the aforementioned
16 document was marked for
17 identification as Comcast Exhibit
18 Number 421.)

19 THE WITNESS: I was not given a
20 copy of that.

21 MR. BURKE: I'm sorry, Your Honor.
22 I gave an extra one over there. Apologies.

1 There you go.

2 JUDGE SIPPEL: You have a right to
3 question that.

4 (Laughter.)

5 BY MR. BURKE:

6 Q Dr. Singer, I would like to ask if
7 you can identify this document.

8 A Yes, I can.

9 Q Is this the Kang article that you
10 cite in footnote 96 of your testimony, of your
11 written testimony?

12 A Yes. And I'm going back to that
13 testimony just to make sure what I said about
14 this article.

15 (Pause.)

16 THE WITNESS: Okay. It is the
17 article that was referenced in footnote 96 in
18 my testimony.

19 MR. BURKE: I would like to move
20 to admit this, Your Honor.

21 MR. LEVY: No objection.

22 JUDGE SIPPEL: It is received in

1 evidence, then, as Comcast number 421.

2 (Whereupon, the aforementioned
3 document, having previously been
4 marked for identification as
5 Comcast Exhibit Number 421, was
6 received in evidence.)

7 BY MR. BURKE:

8 Q So I want to focus you on the
9 abstract of this article, Dr. Singer, and just
10 the second sentence of the first page.

11 JUDGE SIPPEL: That's on page 2,
12 the second page of --

13 MR. BURKE: That is correct, Your
14 Honor. It's the second page, entitled
15 "Abstract."

16 BY MR. BURKE:

17 Q I just want to focus you on the
18 second sentence, which reads, "The research
19 supports the reciprocal carriage hypothesis by
20 finding that: a vertically integrated MSO is
21 more likely than a non-vertically integrated
22 MSO to carry the start-up basic cable networks

1 of another MSO; and, two, a vertically
2 integrated MSO is no more likely than a
3 non-vertically integrated MSO to carry
4 independent start-up basic cable channels."

5 Do you see that, Dr. Singer?

6 A Right, right.

7 Q I want to focus you on the second
8 of those two conclusions. The second one says
9 a vertically integrated MSO is no more likely
10 than a vertically integrated MSO to carry
11 independent start-up basic cable networks. Do
12 you see that?

13 A Yes.

14 Q Doesn't that mean that there's no
15 difference between vertically integrated and
16 non-vertically integrated MSOs with respect to
17 independent programming networks?

18 A That's what the second bullet
19 would mean, yes.

20 Q And, of course, your client, the
21 NFL Network, is an independent programming
22 network, right?

1 A Correct.

2 Q And so this stands for the
3 proposition that there is no reason to infer
4 discrimination against an independent
5 programming network by a vertically integrated
6 MSO?

7 A That's not what I am trying to
8 establish here. I am trying to establish that
9 the carriage decisions of cable operators are
10 interconnected. They follow each other. They
11 have reciprocal deals. So I don't see how
12 proposition 2 speaks to what I am using the
13 Kang article for here.

14 Q So the Kang article does not
15 support the view that there is coordination
16 among cable operators with respect to
17 independent channels, like your clients.
18 Isn't that right?

19 A The Kang article -- no, it's not.
20 The Kang article in proposition 1, which I
21 know you don't like as much as proposition 2,
22 says that the MSOs are more likely to carry

1 their own. What does that mean? It means
2 they are less likely to carry the
3 unaffiliated.

4 Q But it doesn't say that. It says,
5 with respect to unaffiliated, doesn't it, that
6 there is no difference?

7 A I think it supports what I am
8 saying. Let me try to say it back, that a
9 vertically integrated MSO, like Comcast, is
10 more likely to carry the programming of
11 another MSO, whether or not it is vertically
12 integrated, than it is to carry an independent
13 network. That is what proposition 1 is
14 saying.

15 Q But aren't we talking about
16 whether there is joint action versus any
17 independent programmer? That is what you are
18 citing this for. Isn't that right?

19 A Yes. Just to be clear, what I am
20 trying to cite it for is that you have Time
21 Warner, who is vertically integrated. And you
22 have got Comcast, who is vertically

1 integrated.

2 And Time Warner is engaged in a
3 reciprocal carriage arrangement, by which Time
4 Warner carries Comcast vertically integrated
5 networks and Comcast carries Time Warner's
6 vertically integrated networks.

7 Proposition 1 says that they are
8 more likely to do that than to carry the
9 start-up network of an independent.

10 Q But you are trying to -- let's go
11 back to first principles. Why are we talking
12 about this? I thought it was to determine
13 whether you can rely upon Time Warner's
14 decisions with respect to an independent
15 channel, like the NFL network. Isn't that
16 right?

17 A Yes, in part. But Comcast has
18 also pointed to the fact that Time Warner is
19 carrying Golf and Versus and trying to cite
20 that as evidence that you see Golf and Versus
21 as more valuable than NFL Network, right? And
22 this is exactly what number 1 speaks to.

1 Q Okay. But let's try to parse this
2 specifically. With respect to whether Comcast
3 and Time Warner or other cable companies are
4 acting in a collusive fashion vis-a-vis
5 independent networks, this article doesn't
6 suggest that there is any correlation between
7 the conduct of vertically integrated MSOs
8 vis-a-vis independent programming networks,
9 like your client.

10 A I think it does. I think what it
11 is saying is that by virtue of the fact that
12 Time Warner is vertically integrated into its
13 own programming, that it is more likely to
14 enter into a reciprocal compensation
15 arrangement by which Time Warner carries
16 Comcast-affiliated networks and Comcast
17 carries Time Warner, more likely to do that
18 than to carry the networks of some independent
19 programmer.

20 Q But I thought we were talking
21 about whether Time Warner's decisions, not
22 about Comcast programming, are relevant.

1 Right now we're not talking about that. We're
2 talking about whether Time Warner's decisions
3 about the NFL Network have any probative
4 value.

5 And doesn't this tell you that
6 there is no evidence of any collaboration or
7 correlation between decision-making with
8 respect to independent programmers, like the
9 NFL Network? Isn't that the second --

10 A I think that it does. I think
11 that when it says that they are more likely to
12 carry a start-up network of another MSO, that
13 means more likely relative to an independent
14 network.

15 Q How do you reconcile the two
16 conclusions, then?

17 A I don't know which two conclusions
18 you are talking about. But at the end of the
19 day, what I am trying to cite this paper for
20 is the proposal that the decisions are made
21 jointly. Carriage decisions by vertically
22 integrated MSOs are made jointly. And I think

1 proposition 1 supports that.

2 Q It supports it at best, doesn't
3 it, only with respect to the affiliated
4 programming. It doesn't support it with
5 respect to independent programming. Doesn't
6 the second conclusion specifically contradict
7 what you are saying, Dr. Singer?

8 A The second proposition isn't
9 really relevant to what I am saying. The
10 second one says that a vertically integrated
11 MSO is no more likely than a non-vertically
12 integrated MSO. That is not the comparison I
13 am trying to make. I am saying the two
14 vertically integrated MSOs, which has more to
15 do with proposition 1, make reciprocal
16 carriage agreements.

17 And if you do that, that means by
18 definition that you are giving preferential
19 treatment to one of your own or one of
20 Comcast's own than an independent.

21 Q It doesn't. It actually says that
22 you are giving preferential treatment to some

1 other MSOs. It doesn't say anything about
2 whether you are preferring your own
3 programming, does it?

4 A You are correct. I am not trying
5 to cite that in this part of my report. We
6 have plenty of evidence going back to my first
7 exhibit of the fact that there is
8 discrimination on the basis of affiliation
9 here by Comcast.

10 Q All this article says, at most, is
11 that Comcast may be more likely to carry Time
12 Warner programming. Is that a violation of
13 the FCC rules as far as you know?

14 A It says a lot more than that. It
15 says, "and vice versa." That is the part that
16 you want to gloss over, is that these guys are
17 making joint carriage decisions, "I will carry
18 your stuff if you carry my stuff."

19 And an independent like NFL
20 Network isn't going to get that break.

21 Q But the second conclusion says
22 that a vertically integrated MSO is no more

1 likely to discriminate against an independent
2 programmer. Doesn't it say that?

3 A No. Relative to a non-vertically
4 integrated MSO. But that --

5 Q Isn't that the appropriate
6 comparison?

7 A I don't think that that is
8 relevant. It could be just relative to
9 anyone.

10 Q Isn't the relevant comparison
11 between a vertically integrated MSO and a
12 non-vertically integrated MSO? If they behave
13 in the same way, doesn't that mean that
14 vertical integration doesn't matter?

15 A They don't behave in the same way.
16 If you have two vertically integrated MSOs,
17 that is the thrust of this article. In fact,
18 the article is called -- I know you didn't
19 want me to read it out loud, but "The
20 Reciprocal Carriage Hypothesis."

21 He's testifying a reciprocal
22 carriage hypothesis among vertically

1 integrated MSOs. And he finds that there is
2 evidence in support of it.

3 Q Actually, just to tie this up
4 because I don't want to behavior this -- it is
5 getting late in the day -- how much more
6 likely is a vertically integrated MSO to carry
7 another vertically integrated MSO's
8 programming than it is to carry something
9 else? What is the percentage difference this
10 article concludes, the increase as a
11 consequence of vertical integration?

12 A I don't have the coefficients in
13 the back of the table memorized. I am sorry.

14 Q I mean, isn't it quite minuscule,
15 like four percent?

16 A I can't comment to that right now.
17 We could go into it and try to interpret the
18 coefficients.

19 JUDGE SIPPEL: I just want to be
20 sure that the record is clear on this. What
21 we have been debating or discussing back and
22 forth here is, again, it's exhibit 421,

1 Comcast number 421, the Kang article. And
2 it's on page 2 of that article under
3 "Abstract." And it's under the principles as
4 stated "(1)" and "(2)." And that's basically
5 been the basis for all of this back and forth.
6 Is that correct?

7 MR. BURKE: That is correct, Your
8 Honor.

9 JUDGE SIPPEL: I just wanted the
10 transcript to reflect that.

11 BY MR. BURKE:

12 Q So, now, another factor, Dr.
13 Singer, that you discuss in your direct
14 testimony is -- I guess we could refer to it
15 as the NFL cities' analysis. Do you know what
16 I am referring to?

17 A I believe so, yes, sir.

18 Q Just so we are all on the same
19 page, if we can go to exhibit 189, paragraph
20 93?

21 JUDGE SIPPEL: When you think that
22 there is a logical place to break for the

1 evening, let me know because obviously we're
2 going to see the doctor in the morning.

3 MR. SCHMIDT: Your Honor, we would
4 like to take Your Honor up on your invitation
5 yesterday to go until we're finished because
6 we have real concerns now. This is our second
7 of four witnesses. Comcast has I think six
8 witnesses.

9 We are worried now about being
10 able to finish Friday and having equal time,
11 which is what we asked for.

12 JUDGE SIPPEL: How long is it
13 going to take, roughly, to finish with this
14 witness?

15 MR. BURKE: I think we only
16 started at 4:30. We have only been going at
17 it about an hour, Your Honor.

18 MR. CARROLL: Your Honor?

19 JUDGE SIPPEL: Yes?

20 MR. CARROLL: We've allotted two
21 days for each side. We have not even gone a
22 day on your side. And I don't see any basis

1 for supposing that there is any time crunch
2 coming. In fact, your fourth witness isn't
3 even ready. And as an accommodation, I am
4 letting him interrupt my case on Thursday.

5 This is your expert, who is
6 central to your case. And I don't think we
7 should be under some sense that you are
8 worried that you are going to miss equal time
9 in my case.

10 My case will be no longer than
11 your case. It will be two days, just as your
12 case has been allotted two days.

13 MR. SCHMIDT: I don't know why we
14 need to bring Dr. Singer back tomorrow if we
15 can finish him tonight.

16 JUDGE SIPPEL: Well, he's here in
17 town. How long is it going to take to finish
18 him?

19 MR. BURKE: I don't think I'm
20 halfway through my cross, Your Honor.

21 JUDGE SIPPEL: Well, it's a
22 quarter to 6:00 up there by the clock. Look,

1 I said that I would stay late to get a witness
2 out of town, you know, on a plane, but I don't
3 see any reason why we have to do that tonight.

4 I mean, anyway, that is what is
5 going to happen. We are going to finish.
6 Before we start your line of questioning, why
7 don't we just quite right now? We'll stop
8 right now.

9 MR. BURKE: That's fine, Your
10 Honor.

11 JUDGE SIPPEL: Get a good night's
12 rest. And we'll start in the morning.

13 MR. BURKE: All right.

14 JUDGE SIPPEL: All right, Doctor?

15 THE WITNESS: Yes.

16 JUDGE SIPPEL: I appreciate it.
17 Okay. It's 20 of 6:00. We're in recess until
18 9:30 tomorrow morning. Thank you.

19 (Whereupon, the foregoing matter
20 was recessed at 5:40 p.m., to be
21 reconvened on Wednesday, April 15,
22 2009, at 9:30 a.m.)